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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. PART 8
Justice

Index Number : 100277/2011
MERCADO, LYDIA
vs.
SIRIUS, LLC, ANSONIA
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 100277-11
MOTION DATE
MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1-10
Answering Affidavits — Exhibits | No(s). 11-13
Replying Affidavits | No(s). 14-18

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FILED
AUG 08 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8-1-12

JOAN M. KENNEY J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

----------X

Lydia Mercado,

Plaintiff,

-against-

Sirius, LLC, Ansonia Realty, LLC, Stahl Real Estate Company and The North Face,

Defendants.

----------X

DECISION AND ORDER
Index Number.: 100277/11
Motion Seq. No.: 001

KENNEY, JOAN M., J.[1]

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

Papers	**Numbered**
Notice of Motion, Affirmation, and Exhibits	1-10
Opposition Affirmation, and Exhibits	11-13
Reply Affirmation, Exhibits	14-18

In this personal injury action, defendant, The North Face, moves for an Order, pursuant to CPLR 3212, dismissing the complaint.

Factual Background

On December 29, 2010, plaintiff Lydia Mercado was walking in an easterly direction on West 73rd Street within the city, county, and state of New York. Plaintiff alleges that her heel got trapped in a crack/hole in the sidewalk, which was also made slippery with snow and ice. As a result, she tripped and fell (the accident). As a consequence of the accident, plaintiff

[1] This decision could not have been written without the assistance of Dannielle O'Toole.

claims she sustained a fracture to her left ankle, as well as a number of consequential damages (Mercado EBT at 126). The accident took place alongside a property known as "The Ansonia" (the building), immediately in front of the North Face store (the sidewalk). *See id.* Defendant North Face is one of the ground tenants in the building. The co-defendants are Sirius, LLC and Ansonia Realty, LLC, companies engaged in the business of owning and managing real estate, including The Ansonia.

The written lease agreement (the lease) between North Face and The Ansonia states that the landlord is responsible for maintaining the sidewalk, and it is undisputed that The Ansonia is responsible for repairing any cracks or holes in the sidewalk (Store Lease ¶ 30). The lease also states that if demised premises are situated on the street floor, "Tenant shall at Tenant's own expense, keep said sidewalks and curbs free from snow, ice, dirt and rubbish, to the extent the condominium board does not keep the sidewalks free of snow, ice and rubbish." *See id.*

It is undisputed that on December 26, 2010, a very large snowstorm occurred that left a large amount of snow on the streets of New York City (the storm). North Face's store manager testified at his EBT that The Ansonia had always removed the snow from the sidewalk. Additionally, he stated that North Face has never possessed equipment or supplies for snow/ice

removal, and its employees have never assisted in snow removal from the sidewalk, before or after the storm (Martino EBT at 10). Further, North Face states that the accident took place within an area barricaded off by caution tape, put there by The Ansonia. Lippman, a vice-president of Sirius, LLC who was deposed, asserted that North Face employees have assisted in snow removal efforts and that the lease places snow removal responsibility on the ground tenants (Lippman EBT at 55; Store Lease ¶ 30). Plaintiff's testimony was devoid of any reference to a barricade and the exact location of the alleged barricade is unknown (Mercado EBT; Gede EBT at 57). The accident report prepared by The Ansonia indicates that caution tape had been trampled and/or ripped down (Exhibit G "Ansonia House Security Report").

Arguments

North Face argues that it is not liable because: (1) the accident was caused by the damaged sidewalk, which it is not responsible to repair; (2) although plaintiff states there were patches of snow/ice that may have created a slippery condition, it is unclear if this contributed to the accident or if plaintiff lost her balance when her heel got stuck in the hole; and (3) arguendo, even if a slippery condition existed and contributed to the accident, North Face is not responsible because The Ansonia affirmatively assumed control over the

snow/ice removal from the subject sidewalk, including allegedly placing a barricade around the area where the accident occurred.

Co-defendants argue that the motion must be denied because: (1) the proximate cause of plaintiff's fall is disputed; (2) North Face is responsible for snow removal pursuant to the terms of the lease; and (3) questions of fact remain about any assistance provided by North Face for the removal of snow and ice (Lippman EBT at 55; Store Lease ¶ 30).

Plaintiff contends that the motion must be denied because: (1) it is uncontroverted that a dangerous condition was created when a path was made in the snow and ice on the sidewalk by one of the defendants where plaintiff alleges she fell; and (2) the contradictory testimony from the parties regarding North Face's alleged responsibilities for snow removal create factual issues which do not warrant summary judgment.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense lacks merit. The motion shall be granted if, upon all the papers and proof submitted,

the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

The rule governing summary judgment is well established: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *See Winegrad v NYU Medical Center*, 64 NY2d 851 (1985); *Tortorello v Carlin*, 260 AD2d 201 (1st Dept. 1999). If movant fails to meet this burden, the motion should be denied even if the papers in opposition are inadequate. *See Pastoriza v State*, 108 AD2d 605 (1st Dept. 1985). The court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine and any conflict in the testimony or evidence presented raises an issue of fact. *See 6243 Jericho Realty Corp. v AutoZone, Inc.*, 27 AD3d 447, 449 (2nd Dept. 2006).

To establish a prima facie case of negligence in a trip and fall action, a plaintiff must demonstrate that a defendant either created a dangerous condition, or had actual and/or constructive notice of the alleged defective condition. *See Arnold v NYC Housing Auth.*, 296 AD2d 355 (1st Dept. 2002). A genuine issue of material fact exists when a defendant fails to show that it did not have actual or constructive notice of a

hazardous condition. *See Aviles v 233 1st Corp.*, 66 AD3d 432 (1st Dept. 2009); *Baez-Sharp v NYC Tr. Auth.*, 38 AD3d 229 (1st Dept. 2007). Constructive notice arises when the defective condition is visible and apparent, and it has existed for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it. *See Strowman v Great Atl. & Pac. Tea Co.*, 252 AD2d 384 (1st Dept. 1998). Negligence cases are not normally ripe for summary judgment because the existence of negligence is typically a question for jury determination. *See Villoch v. Lindgren*, 269 AD2d 271 (1st Dept. 2000).

North Face claims that the crack/hole in the sidewalk was the proximate cause of the accident, and that The Ansonia is responsible for this defect. Plaintiff states that the accident was caused because of the crack/hole in the sidewalk *and* the snow/ice in the immediate vicinity (Mercado EBT at 56). Since the proximate cause of the accident is contested, dismissal is not warranted.

North Face's claim that it did not have any notice of the alleged defective condition cannot be sustained. North Face's defense is grounded in the notion that The Ansonia controlled the process by which snow/ice was removed from the sidewalk (Martino EBT at 10). North Face's store manager testified that its employees never assisted in the removal of snow and ice. Further, North Face doesn't possess any equipment nor supplies

to effectuate snow/ice removal. *See id.* These assertions are directly contradicted by Lippman's testimony and the language of the lease (Lippman EBT at 55; Store Lease ¶ 30).

The lease states that Northface is responsible for snow/ice removal not performed by the landlord (Store Lease ¶ 30). Being unprepared is not a valid defense, and constructive notice can be assumed because the accident happened three days subsequent to the storm, which is a sufficient amount of time for notice to be attributable. North Face should and/or could have known of the condition of the sidewalk had its employees inspected the sidewalk as required by the lease within these three days. *See id.*

Lippman testified that North Face's employees have, in the past, assisted in snow removal efforts (Lippman EBT at 55). This conflicting testimony creates triable issues of fact to be determined by a jury.

Finally, North Face maintains that the accident occurred within a taped off area erected by The Ansonia. Plaintiff's testimony does not make any reference to any barricade, the exact location of the alleged barricade is unknown, and the accident report prepared by The Ansonia states that the caution tape had been trampled/ripped down (Mercado EBT; Gede EBT at 57; Exhibit G "Ansonia House Security Report"). These contested

factual assertions also make summary judgment inappropriate. Accordingly, it is

ORDERED, that defendants' summary judgment motion, is denied, in its entirety; and it is further

ORDERED that the parties proceed to mediation, forthwith.

Dated: August 1, 2012

ENTER:

Joan M. Kenney, J.S.C.